LIBRARY
SUPREME COURT, U. S.

FILED
SEP 4 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-412

ROBERT E. IANNELLI AND DOLORES IANNELLI,
HIS WIFE,
Petitioners,

v.

H. ALAN LONG, District Director, Pittsburgh,
Pennsylvania and JOHNNIE M. WALTERS,
Commissioner of the Internal Revenue
of the United States of America,
Successor to HAROLD T. SWARTZ,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JAMES E. McLAUGHLIN
618 Frick Building
Pittsburgh, Pa. 15219
(412) 471-3250
Attorney for Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement of Case	2
Reasons for Granting the Writ	6
Conclusion	11

Appendix A—Opinion of District Court Below	1a
Appendix B—Opinion of Court of Appeals Below	12a
Appendix C—Denial of Petition for Rehearing	16a
Appendix D—Statutes Involved	17a

TABLE OF CITATIONS

CASES:

Americans United, Inc. v. Walters, 31 A.F.T.R. 582 (C.A. D.C.), certiorari granted, No. 72-1371, June 4, 1973)	7
Bob Jones University v. Connally, 472 F.2d 903 (Cir. 4, 1973), petition for certiorari filed April 30, 1973	7
Cole v. Cardoza, 441 F.2d 1337 (Cir. 6, 1971)	7
Collins v. Daly, 437 F.2d 736 (Cir. 7, 1971)	7
DeVita v. Sills, 422 F.2d 1172, 1181 (Cir. 3, 1970)	9
Enochs v. Williams Packing Co., 370 U.S. 1 (1962)	6, 7, 8, 9
Grosso v. United States, 390 U.S. 62 (1968)	10
Helvering v. Taylor, 293 U.S. 507 (1935)	7
Iannelli v. Long, 333 F. Supp. 407 (1971)	2, 6, 9

Page

Independent Wireless Tel. Co. v. Radio Corp., 269 U.S. 459, 472 (1925) 9
Lucia v. United States, 474 F.2d 565 (Cir. 5, 1973) ... 6, 8
Marchetti v. United States, 390 U.S. 39 (1968) 10
Pizzarello v. United States, 408 F.2d 579 (Cir. 2, 1969), cert. denied 396 U.S. 986 (1970) 6-7, 8
United States v. Kordel, 397 U.S. 1 (1970) 9
United States v. United States Coin & Currency, 401 U.S. 715 (1971) 10

STATUTES:

Section 7421, Internal Revenue Code of 1954 .....6, 7, 9
26 U.S.C. 4401 10
18 U.S.C. 1955 10
18 U.S.C. 2516 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

ROBERT E. IANNELLI AND DOLORES IANNELLI,
HIS WIFE,

Petitioners,

v.

H. ALAN LONG, District Director, Pittsburgh, Pennsylvania and JOHNNIE M. WALTERS, Commissioner of the Internal Revenue of the United States of America, Successor to HAROLD T. SWARTZ,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on June 29, 1973.

CITATIONS TO OPINIONS BELOW

The district court's opinion granting injunctive relief is reported at 333 F. Supp. 407 and is reprinted in Appendix A, *infra*. The opinion of the Court of Appeals is not yet reported and is reprinted in Appendix B, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1973. A timely petition for rehearing was filed and was denied July 26, 1973. (Appendix C, *infra*.) The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Where the Internal Revenue Service under the guise of the collection of taxes requires taxpayers to make a choice between the exercise of their Fifth Amendment rights or the forfeiture of all of their property, does not the district court have the power to grant limited injunctive relief in order to preserve the rights of the taxpayers and the government.

STATUTES INVOLVED

The statutory provisions involved are set forth in Appendix D, *infra*.

STATEMENT OF THE CASE

On November 3, 1971, the United States District Court for the Western District of Pennsylvania enjoined the Internal Revenue Service from executing on certain liens or in any other manner attempting to effect collection of a wagering tax assessment placed against the husband and wife petitioners here. The

Internal Revenue Service appealed and the Order of the district court was reversed by a panel of the United States Court of Appeals for the Third Circuit on June 27, 1973. A timely petition for rehearing having been denied, petitioners are seeking a writ of certiorari, in support of which they set forth the following summary of the record below:

On March 25, 1971, Robert and Dolores Iannelli, his wife, were indicted with others at Criminal No. 71-62 in the United States District Court for the Western District of Pennsylvania. They were charged with conspiracy and violation of certain federal anti-gambling statutes.

On May 7, 1971, Robert Iannelli received notices of excise tax assessments from the Internal Revenue Service in the amount of $712,064.51. (14A)* On May 10, 1971, identical assessment notices were sent to Robert and Dolores Iannelli marked "corrected bill", the only difference in the latter assessment notices was that the assessments were made against both husband and wife. (16A) The assessment notices demanded payment in full within ten days. Timely claims for abatement were filed by the Iannellis' accountant but the claims were rejected on July 2, 1971. Several weeks before the claims for abatement were rejected, the IRS filed liens against all of the Iannellis' property and proceeded to seize their checking and savings accounts, sealed their safe deposit boxes and levied upon all the rental income from a substantial number of rental properties owned by the Iannellis. (103A)

---

* References are to the Appendix and Supplemental Appendix in the Court of Appeals.

On July 8, 1971, the Iannellis filed a Complaint for an injunction against the IRS at Civil Action No. 71-639. On July 9, 1971, the matter came on for hearing before the Honorable Wallace S. Gourley. Because of the press of other court business, Judge Gourley could not dispose of the matter that day and requested counsel for the IRS to forbear from any further collection procedures until the matter could be set for a hearing. When counsel for the IRS indicated that the IRS had no intention of refraining from further collection procedures in spite of the matter being before the court, Judge Gourley issued a Temporary Restraining Order. (26-28 Supp.A.)

The matter came on for additional hearing before Judge Gourley on July 15, 1971, at which time counsel for the IRS conceded that normal Service procedure was to stay collection until matters of this type could be judicially determined in a refund suit. (30 Supp.A) He further conceded that the government would gain nothing from the forced sale of the real estate. (30 Supp.A) This hearing was further continued until August 6, 1971.

At the hearing of August 6, 1971, the Iannellis' accountant detailed how he had been refused any explanation of the assessment, had been refused a conference and that in twenty-three years as an employee of the IRS he had never known of a taxpayer to be treated in such an arbitrary fashion.

He then testified that his investigation disclosed that the original assessment of May 7 against Robert Iannelli was valid, but that on May 10 the records were altered by the insertion of the name Dolores Iannelli in violation of IRS regulations and

that the joint assessment and subsequent levies and seizures based thereupon were illegal and invalid. The IRS conceded the invalidity and this action was dismissed by stipulation upon the IRS's representation that the joint liens would be released.

On the same day the action before Judge Gourley was dismissed, the District Director of Internal Revenue made an alleged "jeopardy" assessment against Robert and Dolores Iannelli jointly in the amount of $722,205.18. Immediately after making its alleged "jeopardy" assessment, the IRS launched into another even more aggressive round of levies and seizures and by September 20, 1971, it had relevied on and seized all of the Iannellis' bank accounts, thirty-nine pieces of rental property, their home, Robert Iannelli's life insurance policies, demanded surrender of their automobiles and indicated that it intended to sell all of their furniture as well as their home. (7A)

This action was instituted on September 27, 1971, and came on for trial on October 12, 1971. At that trial Iannellis' accountant testified to substantially the same matters that he had testified to in the first trial and in addition testified that in his opinion a joint assessment on a husband and wife was improper in the field of excise tax on wagering. The testimony further disclosed that the entire assessment was based upon certain projections made by IRS agents from wiretap information turned over to them by members of the Justice Department. (36A) Plaintiffs also offered in evidence a tape-recording of an interview on a local television station with Jules Brunner, head of the Justice Department's Strike Force in Pittsburgh. In that interview Mr. Brunner in an unmistakable reference to the case at bar indicated that the collection

procedures in this case were a valuable adjunct to criminal prosecution in terms of harassment. (64A, 65A) The harassment aspect of the Service's collection efforts was noted by the district court in its Opinion. 333 F. Supp. at 410, n.6 (106A).

In April of 1972, the petitioners here were tried on the indictment that had been brought against them in March of 1971. In that trial Robert Iannelli was convicted and subsequently sentenced to a substantial prison term. The jury could not agree on a verdict as to Mrs. Iannelli and a mistrial was declared as to her. She was subsequently retried alone and was convicted also. Each of the petitioners appealed to the United States Court of Appeals for the Third Circuit which affirmed their convictions; each of them presently has petitions for certiorari pending before this Court. (Nos. 73-64 and 73-103)

REASONS FOR GRANTING THE WRIT

The question of whether the district court has the power to enjoin the collection of wagering excise taxes in the face of Section 7421 (a) of the Internal Revenue Code of 1954 has resulted in conflicting decisions in the Courts of Appeals of the United States. The Third Circuit in the instant case has held that section 7421 (a) in light of this Court's holding in *Enochs* v. *Williams Packing Co.*, 370 U.S. 1 (1962) is an absolute bar to injunctive relief. The Fifth Circuit, in February of this year, has held that a taxpayer would be entitled to injunctive relief if it was shown that the assessment was arbitrary, capricious and without foundation in fact. *Lucia* v. *United States*, 474 F.2d 565 (Cir. 5 1973). The Second Circuit has also upheld the right to injunctive relief. *Pizzarello* v. *United States*, 408 F. 2d 579

(Cir. 2 1969) *cert. den.* 396 U.S. 986 (1970). The Sixth Circuit in *Cole* v. *Cardoza,* 441 F. 2d 1337 (Cir. 6 1971) and the Seventh Circuit in *Collins* v. *Daly,* 437 F. 2d 736 (Cir. 7 1971) have held to the contrary.

It is important to both the government and the taxpayers involved that this conflict among the Circuits be resolved. Whether a taxpayer may obtain injunctive relief from a ruinous levy should not depend upon an accident of geography. If Florida and New York taxpayers are able to avail themselves of equitable relief can it be seriously contended that Pennsylvania taxpayers may not?

The availability of injunctive relief to a taxpayer in light of the Anti-Injunction Act (section 7421 (a) will be considered by this Court next term in the case of *Americans United, Inc.* v. *Walters,* 31 A.F.T.R. 582 (C.A. D.C.), cert. granted, No. 72-1371, June 4, 1973. The same issue has been raised in the case of *Bob Jones University v. Connally,* 472 F. 2d 903 (Cir. 4 1973), Petition for Certiorari filed April 30, 1973. In the government's memorandum in response to that petition Solicitor General Griswold joined in the request for review by this Court noting there was a conflict between the decisions of the Court of Appeals for the District of Columbia and the Fourth Circuit. Though neither of these cases involve wagering taxes, both involve the interpretation of section 7421 (a) and the holding of this Court in *Enochs, supra.*

It is respectfully suggested that the instant case involves a question of considerably greater constitutional dimension than is presented by either the *Americans United* or the *Bob Jones* cases. In this case the taxpayers were faced with a cruel and unconscionable dilemma. They were both under indictment for viola-

tions of federal law. Since the tax assessment against them was for excise taxes their only legal remedy was to pay a portion of the tax and bring a suit for refund. The burden is on the taxpayer in a refund suit not only to show that the assessment is erroneous but also to show the amount to which the government is actually entitled. *Helvering* v. *Taylor,* 293 U.S. 507 (1935). They were thus faced with the choice of either forsaking their Fifth Amendment rights or forfeiting all of their worldly possessions.

Faced with this impossible choice the taxpayers sought refuge in the equity jurisdiction of the Federal District Court. The district court reasoned a rational and reasonable remedy for the irreparable wrong sought to be imposed upon the taxpayers. The government in the district court and in the Court of Appeals placed all of its reliance on the holding in the *Enochs* case. The district court correctly concluded that it was presented with an entirely different situation than was presented by *Enochs. Enochs* did not involve Fifth Amendment questions; *Enochs* did not involve parallel refund actions and criminal actions; *Enochs* did not involve a question of forfeiture of liberty or property. *Enochs* was an adequate decision in its own time and space of American jurisprudence, but it is now eleven years later and we respectfully submit that the teachings of *Enochs* should be reviewed in the light of the serious constitutional problems presented by this case.

The Third Circuit without adverting to any relevant recent decision such as *Lucia, supra,* or *Pizzarello,* supra., took a rather simplistic view of the facts and held that the taxpayer's rights would be protected in a refund action by a request for a stay of all proceedings until their rights were fully protected by the run-

ning of the statute of limitations. In support of this holding the Third Circuit cited *United States* v. *Kordel,* 397 U.S. 1, (1970) and *DeVita* v. *Sills,* 422 F. 2d 1172, 1181 (Cir. 3 1970). Neither of the cases cited by the Third Circuit provide the petitioners here with any refuge at all. Indeed, the *DeVita* case explicitly negates such an illusory sanctuary.

In 1925 Mr. Justice Taft stated that equity will not suffer a wrong without a remedy. *Independent Wireless Tel. Co.* v. *Radio Corp.,* 269 U.S. 459, 472 (1925). In 1971 the district court in this case fashioned a limited remedy for what was certainly apprehended as a limitless wrong. In 1973 the Third Circuit Court of Appeals has given the government carte blanche to fashion the forfeiture of a suspected gambler's property under the mistaken view that the decision of this Court in *Enochs* is universally applicable.

Harsh though the precepts of *Enochs* may be, that holding did recognize that there are circumstances in which a taxpayer may be entitled to equitable relief. If it appears that the government may under no circumstances prevail, *Enochs* teaches that the exaction is merely in the guise of a tax and thus the attempted collection may be enjoined. In the instant case the government has conceded that its collection endeavors will avail it of nothing, yet as the district court noted it will continue to pursue an unusually aggressive collection policy. 333 F. Supp. at 410. If, as the government has conceded that it will realize nothing from a forced sale of the taxpayers' assets, how then is the purpose of section 7421(a) served? It seems to us as it did to the district court that the government in this case is attempting to achieve a practical forfeiture of the peti-

tioners' property under the guise of the collection of a tax.

Since the decision of this Court in *Marchetti* v. *United States,* 390 U.S. 39 (1968) and *Grosso* v. *United States,* 390 U.S. 62 (1968), the Internal Revenue Service has been somewhat hobbled in its efforts to implement the wagering tax statute. (26 U.S.C. 4401) The reaffirmance of *Marchetti* and *Grosso* by this Court in *United States* v. *United States Coin and Currency,* 401 U.S. 715 (1971), has precluded the government from forfeiting the proceeds of wagering. In this case the forfeiture proscribed by the decision of this Court in the *U. S. Coin* case was attempted in a somewhat more sophisticated manner, and which we suggest requires considered scrutiny by this Court.

The taxpayers here found themselves faced first with a federal indictment charging them with violations of the Organized Crime Control Act of 1970, 18 U.S.C. 1955. This Act became effective on October 15, 1970. Within a few days of the effective date of the Act the taxpayers were the subject of a court authorized electronic surveillance of their residence phones. The taxpayers were indicted in March of 1970; they were the recipients of a wagering tax assessment in excess of seven hundred thousand dollars in May of 1971. It is undisputed that the bulk of the assessment was based upon projections made from the wire interceptions. (97A) While the clear language of 18 U.S.C. 2516 negates any authority on the part of the government to utilize electronic surveillance as an aid to the civil collection of taxes, it is clear that the petitioners' present predicament stems almost solely from an obviously overreaching interpretation of that statute by the Internal Revenue Service.

While we recognize that in the present posture of this case the Court cannot concern itself with the legality of the means used by Internal Revenue to secure the information upon which it has based its assessment, we suggest that the Court cannot be oblivious of the petitioners' practical plight. The petitioners here, were and are faced with a ruinous levy. This levy is bottomed upon wire interceptions, the validity of which are in serious question. While the petitioners await a final determination of their criminal liability, if any there be, they will have been rendered penniless by the course of action opened to the government by the decision of the Third Circuit.

The District Court percieved the problems presented by this case and put them in proper constitutional perspective. The Third Circuit Court of Appeals disagreed. Only this Court can put the problem back into proper perspective.

CONCLUSION

It is respectfully submitted that certiorari should be granted in this case because there is a conflict among the Courts of Appeals of these United States and this conflict can only be resolved by this Court. This case is of considerable constitutional importance in terms of its Fifth Amendment problems in the context in which they arise here and will undoubtedly arise in the future.

Respectfully submitted.

JAMES E. MCLAUGHLIN
618 Frick Building
Pittsburgh, Pa. 15219
Attorney for Petitioners

APPENDIX

APPENDIX A

[Filed November 3, 1971]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLANIA

Civil Action No. 71-905

ROBERT E. IANNELLI and DOLORES IANNELLI, his wife,
Plaintiffs

vs.

H. ALAN LONG, DISTRICT DIRECTOR OF INTERNAL REVENUE, PITTSBURGH, PENNSYLVANIA, and HAROLD T. SWARTZ, ACTING COMMISSIONER OF INTERNAL REVENUE OF THE UNITED STATES OF AMERICA, *Defendants.*

Opinion

JOSEPH F. WEIS, District Judge

American preoccupation with due process and taxation goes back to the gestation of the Republic. It is not a purely historic interest but a continuing one because the harsh realities of the necessity of collecting revenue and the natural reluctance of the citizen to pay over to the government that which he considers his own has resulted in some rather arbitrary statutory methods of extracting that which is due Caesar.

There is no doubt that Congress has the right to tax an occupation which in and of itself is illegal. But when collection methods and timing become such as to relegate the taxpayer to a choice between a forfeiture and the exercise of his constitutional privilege against self-incrimination, then due process demands cannot be ignored.

Robert Iannelli was indicted in this Court on March 25, 1971 for conspiracy and violation of the gambling

laws of the United States.[1] Disposition of preliminary motions in his case is under-way and trial must necessarily be delayed because of involved questions raised by the many defendants indicted along with him.

On May 7, 1971 Robert Iannelli received an assessment for wagering tax due for the period September, 1969 through June 30, 1971 in the amount of $712,064.41.[2] On May 10, 1971 the name of his wife, Dolores, was added to the assessment.

When the assessments were not paid within ten days as demanded, liens were filed against all property of the plaintiffs, appropriate entries being made in the Prothonotary's Office of the Court of Common Pleas of Allegheny County, Pennsylvania on June 16, 1971. A week later there were seizures of the Iannelli's checking and savings accounts, and the safety deposit box in their names was sealed.

On July 1, 1971 the realty management firm of Ligo & Miller Company was levied upon and ordered to turn over to the Internal Revenue Service all rents from apartment buildings owned by the plaintiffs. The realty firm had previously been employed by the plaintiffs to collect the rents and use the proceeds to pay current amounts due on the mortgages, real estate taxes, and maintenance charges on the property, the remainder to be disbursed to the Iannellis.

An action for an injunction against the government was brought by the plaintiffs in this Court before the Honorable Wallace S. Gourley on July 8, 1971. It was dismissed

---

[1] Criminal 71-62. 18 U.S.C. §§ 2,371, 1302, 1342, 1952, 1955.

[2] *See* 26 U.S.C. § 4401, et seq. While the plaintiffs contend that there can be no joint assessment, *Compton* v. *United States*, 334 F. 2d 212 (4th Cir. 1964) holds otherwise. In a refund action the question of ownership of the business may be for the jury. *United States* v. *Bowen*, 411 F. 2d 923 (5th Cir. 1969).

on August 6, 1971 by consent of the parties when the government conceded the addition of the wife's name to the assessment had not complied with appropriate regulations and that therefore the liens were not valid.

On that same day, however, the government issued a "jeopardy assessment", renewed all the liens and relevied on the plaintiffs' various bank accounts. The net result is that the liens and levies have been continuous from the time when they were originally instituted in June and July and that the plaintiffs have had no opportunity to secure possession of their property since that time.

On September 16, 1971 the Internal Revenue Service levied on the life insurance policy of the husband plaintiff, Robert Iannelli, and demanded payment from the insurance company of the cash loan value of the contract.

The plaintiffs' home was also liened by the IRS, their automobiles have been made subject to seizure, and the government indicates that an inventory of the furniture in the Iannelli home will also be made preliminary to a tax sale.

It now appears that foreclosure proceedings on the apartment buildings are imminent and although the first mortgage balance is approximately $500,000, there is a substantial equity in the properties above that figure.

The plaintiffs say they do not owe $722,205.18 and cannot pay it.

The assessment is based upon a projection of wagers allegedly accepted by Robert and Dolores Iannelli and rests upon records covering a period of seven days seized by the Pennsylvania State Police on September 20, 1969. In addition, through the use of a wiretap authorized in this Court and which is involved in the criminal proceedings, data was secured for a period of gambling operations be-

tween October 21, 1970 and November 2, 1970. A combination of the data for these two periods of time led the IRS to assume that the plaintiffs accepted the following wagers:

Baseball	$ 240,911.00
Football	5,250,696.00
Numbers	1,200,568.00
Horse Racing	1,870.00
	$6,694,045.00

The wagering tax on this estimated figure amounts to $669,404.50, to which was added interest, bringing the total amount to $722,205.18.[3]

The plaintiffs contend that the assessment is arbitrary, capricious and contrary to law. They do not deny that they have received wagers[4] nor do they deny that some tax may be due.

The usual method for obtaining a court review of the amount due is by means of a suit for refund. This requires that the plaintiffs pay the full amount of the assessment and then file a suit in the district court for such amount as they say should be repaid. In the alternative, the taxpayer may file a bond in the total amount of the assessment. The plaintiffs assert that they cannot meet either of these requirements and are therefore prevented from bringing the matter to court.

It appears that in many situations, however, the Government is willing to accept a payment of part of the amount assessed, permit the taxpayer to file a suit for refund of that amount and, during the course of the litiga-

---

[3] In one part of the record, the amount claimed is said to be $724,950.12 (Tr. p. 10) as of September 20, 1971, the Government claims $756,599.09 (Tr. p. 14).

[4] Robert Iannelli pleaded guilty in the state court on January 20, 1970 on charges of illegal gambling. 18 P.S. § 4607.

tion, have a determination of the correct total which should be paid to the Government.[5] It seems, customarily, that when such a procedure is used, the IRS does not pursue its collection and tax sale proceedings during the course of the litigation. There is no assurance, however, that such restraint will be exercised in this case and, in fact, the plaintiffs contend, via statements from at least one government official, that an unusually aggressive collection policy will be pursued.[6] The Government does not deny that contention or indicate that it would follow its customary practice of forbearance while the refund suit is in progress.

There appears to be nothing in the Revenue Code which would prevent the Government from selling all of the plaintiffs' property during the course of a suit for refund even though this might result in tremendous losses to the plaintiffs by having the properties sold at a much lower price than they would ordinarily command and even though it might be proved later at the trial that the Government's claim was greatly inflated or even not due at all.

Nor do the plaintiffs' problems cease with this difficulty. In order to prevail in a suit for refund, the burden of establishing the correct tax due is upon the taxpayer. The Iannellis, therefore, would be required to prove facts about their operations and income which might directly incriminate them both in the pending federal court suit and perhaps also in a state court action.

---

[5] *See* Flora v. United States, 362 U.S. 145, 171 n. 37(b), n. 38.

[6] During the course of an interview on a local television station, a former member of the Strike Force in Pittsburgh, obviously referring to the case at bar, discussed the imposition of the assessment in connection with criminal sanctions and admitted, "They might consider it harassessment if someone pulled up to your house with a moving van and started to take away your furniture." (Tr. p. 55).

To the plaintiffs, therefore, the choice seems to be simple. They either waive their right to be silent under the Fifth Amendment of the Constitution in connection with the criminal case or they must forfeit all of their property down to and including the furniture in their home.

The other side of the case, however, is not without some valid countervailing consideration. The Internal Revenue Service says that its experience has been that when the lien is lifted, property such as that which may be in the safety deposit box disappears and is never seen again. The Service also points out that the plaintiffs here have failed to file a complete inventory of their possessions or to give any assurances that the same would be available in the event that ultimately it is determined that a large tax is due. There is nothing in the record to indicate that the Government's position is completely at odds with realities.

The Government argues further that this Court has no jurisdiction because of the provisions of 26 U.S.C. § 7421 which says in part:

> "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is a person against whom such tax is assessed."

The leading case upon which the defense relies is *Enochs* v. *Williams Packing Company*, 370 U.S. 1, where the Supreme Court emphasized the restrictive nature of the statute and held in essence that an injunction would be allowed only "if it is clear that under no circumstances could the government ultimately prevail." *Id.*, at 7.

In *Enochs, supra*, the taxpayer had asked for an injunction because it said payment of the total amount of the assessment for an excise tax would drive it into bankruptcy. While the court held that this was not sufficient to justify the issuance of an injunction, it is important that

the protection against self-incrimination was not involved and also that the Supreme Court pointed out the fact that a partial payment could be made to provide an opportunity to litigate the whole controversy.

Two cases in the Courts of Appeal have allowed injunctions in cases involving the wagering tax. They are *Lucia* v. *United States* decided by the Court of Appeals for the Fifth Circuit on August 23, 1971 where that court held that, since the statute of limitations for collection of the tax had expired, an injunction would be proper. In *Pizzarello* v. *United States,* 408 F.2d 579, the Court of Appeals for the Second Circuit permitted the consideration of an injunction where it appeared that the assessment was based upon evidence seized illegally.

Injunctions, however, were refused in the cases of *Cole* v. *Cardoza,* 441 F.2d 1337 (6th Cir. 1971); *Trent* v. *United States,* 442 F.2d 405 (6th Cir. 1971); and *Collins* v. *Daly,* 437 F.2d 736 (7th Cir. 1971). *Hamilton* v. *United States,* 429 F.2d 427, was another decision by the Court of Appeals of the Second Circuit where, however, an injunction was refused on the basis that the statute of limitations for a criminal proceeding was due to run very soon.

Three decisions of the United States Supreme Court in the past few years have a substantial bearing on the situation involved in this case. They are *Marchetti* v. *United States,* 390 U.S. 39; *Grosso* v. *United States,* 390 U.S. 62; and *United States* v. *Coin & Currency,* 401 U.S. 715. *Marchetti* and *Grosso* dealt with criminal convictions for failure to file wagering tax forms under Section 4401. The Supreme Court held that there could be no criminal convictions because the requirement of filing forms which were later distributed to state officials for use in gambling prosecutions violated the defendant's constitutional rights. In the course of the opinions, the court made it very clear that Congress was free to levy taxes on wagers and collect

them in civil proceedings. In concluding the *Marchetti* opinion, the court said, at page 61:

> "We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements."

In *United States* v. *Coin & Currency*, supra, at page 717 the court re-emphasized the holding of *Marchetti* and *Grosso* and said:

> "In those cases, we took pains to make it clear that the Court in no way doubted the Government's power to assess and collect taxes on unlawful gambling activities. It was only the method Congress had adopted in collecting the tax that raised the Fifth Amendment question. * * * Since it was only this method of tax collection which was subject to constitutional objection, we indicated that the Government remained free to collect taxes due under the statute so long as it did not attempt to punish the taxpayer for his failure to file the required documents."

In *Coin*, supra, the Government argued that it was simply trying to forfeit money which had been found in the possession of a gambler, that this was civil in nature, and not strictly a criminal case. The Court, howevr, said at page 718:

> "But as Boyd v. United States, 116 U.S. 616, 634 (1886), makes clear, 'proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal' for Fifth Amendment purposes."

We recognize that from a purely legal standpoint the proceedings to collect the taxes from the Iannellis in this case do not constitute a forfeiture. However, from a practical

standpoint, a tax sale of all property they own without the opportunity to contest it in a court of law is for all intents and purposes a forfeiture. See *United States* v. *Coin & Currency*, supra, at page 718.

In some earlier cases which arose during the prohibition era when Congress was attempting to regulate another illegal activity, the sale of intoxicating liquors, by the use of taxes, the Supreme Court in *Lipke* v. *Lederer*, 259 U.S. 557 said, at page 562:

> "Before collection of taxes levied by statutes enacted in plain pursuance of the taxing power can be enforced, the taxpayer must be given fair opportunity for hearing—this is essential to due process of law. [citation] And certainly we cannot conclude, in the absence of language admitting of no other construction, that Congress intended that penalties for crimes should be enforced through the secret findings and summary action of executive officers. The guarantees of due process of law and trial by jury are not to be forgotten or disregarded."

In that case the Court held an injunction should have been granted despite the provisions of the anti-injunction law. A similar result was reached in the case of *Regal Drug Co.* v. *Wardell*, 260 U.S. 386. While these cases are said to stand for the proposition that the prohibition does not extend to suits brought to restrain collection of a penalty, *Miller* v. *Nut Margarine Co.*, 284 U.S. 498, 506, we have difficulty in detecting the distinction between the fact situation involved there and in the case at bar. *See also* the concurring opinion of Mr. Justice Brennan in *Grosso*, supra.

We think that justice would not be served by permitting the Government to foreclose and sell all of the taxpayer's property before the matter can be reached for a determination in court. By the same token, we must recognize that the Government's fears that property will disappear be-

fore the amount can finally be determined may well have some basis in fact.

One other concept comes into play here. Federal Courts have deferred civil proceedings pending the completion of parallel criminal prosecutions when the interests of justice seemed to require such action. For a listing of representative cases, see *United States* v. *Kordel*, 397 U.S. 1, 12 n. 27. We believe that the spirit of the holdings in those cases is applicable in the factual situation at bar.

In these circumstances, we conclude that a temporary injunction should issue enjoining the Internal Revenue Service from executing on its liens until such time as the criminal proceedings have terminated, the criminal statute of limitations shall have tolled, or such earlier event as may occur to protect the rights of the parties. In order to protect the Government's interest in preventing the dissipation of the plaintiffs' assets, a Receiver will be appointed to take possession of the rents from the apartment buildings and to disburse the funds to bring the mortgages current, maintain the property and keep the remainder in savings accounts under his control.

Our decision thus is not really to prohibit but only to defer collection of the taxes until such time as the plaintiffs may litigate their tax liability in court just like any other citizen and without giving up their constitutional rights, just like any other citizen.

The defendants' Motion to Dismiss will be denied. An appropriate Order of Injunction will be issued.

Order of Court for Temporary Injunction

AND NOW, to-wit, this 3 day of November, 1971, IT IS ORDERED that the defendants, their employees and successors in office, and those acting through or in behalf of them, are enjoined from executing on any liens presently existing against the plaintiffs; or selling or offering for sale any property, real or personal of the plaintiffs; or

in any other manner seeking to collect moneys on property from the plaintiffs in payment of the assessment levied against the plaintiffs by virtue of alleged failure to pay wagering taxes due.

All liens are to remain in full force and effect, however, and plaintiffs are enjoined from altering, affecting, changing or modifying property or assets to which a lien is applicable.

Any signs advising of IRS levies shall be removed from the property of the plaintiffs forthwith.

A Receiver shall be appointed by the Court after conference with counsel for both parties. Said Receiver shall receive from the realty managing agent all rents from the apartment buildings after disbursements have been made for routine maintenance. The Receiver shall pay the remaining sums to the mortgagees on plaintiffs' rental property to bring the accounts current. Any residuals shall be deposited by the Reciever in interest bearing accounts in federally insured savings institutions.

This injunction shall continue in effect until further Order of Court.

Plaintiffs shall post bond in the amount of One Thousand ($1,000.00) Dollars with an approved surety.

/s/ JOSEPH F. WEIS, JR.
District Judge

cc:
JAMES E. MCLAUGHLIN, ESQUIRE
618 Frick Building
Pittsburgh, Pennsylvania 15219

RICHARD L. THORNBURGH, ESQUIRE
United States Attorney
633 United States Courthouse
Pittsburgh, Pennsylvania 15219

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1418

ROBERT E. IANNELLI AND DOLORES IANNELLI,
HIS WIFE

v.

H. ALAN LONG, District Director, Pittsburgh, Pennsylvania and JOHNNIE M. WALTERS, Commissioner of Internal Revenue of the United States of America, successor to HAROLD T. SWARTZ, *Appellants.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued February 27, 1973
BEFORE: HASTIE AND ALDISERT, *Circuit Judges,* AND DITTER, *District Judge.*

Opinion of the Court

(Filed June 29, 1973)

BY HASTIE, *Circuit Judge.*

The order from which the government has taken this appeal enjoined the District Director and the Commissioner of Internal Revenue from seizing or selling, until further order of the court, any property of Robert Iannelli or his wife Dolores to satisfy jeopardy assessments against them for alleged failure to pay overdue federal wagering taxes. In its opinion, W.D. Pa. 1971, 333 F. Supp. 407, the court explained that the purpose of this temporary injunction was to protect the taxpayers against possible necessity for

self incrimination if, in normal course, they should undertake to establish in a civil suit a right to refund of sums collected pursuant to these assessments while criminal proceedings growing out of their alleged wagering business were pending. The government contends that the district court lacked jurisdiction to grant this injunctive relief because section 7421(a) of the Internal Revenue Code of 1954, U.S.C. § 7421(a), provides, with irrelevant exceptions, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person".

The parties agree that section 7421(a) is comprehensive and that on its face it seems to prohibit such a suit and such an injunction as we have here. *Cf. Enoch* v. *Williams Packing & Navigation Co.*, 1962, 370 U.S. 1; *Johnson* v. *Wall*, 4th Cir. 1964, 329 F.2d 149. It reflects an evident purpose to protect the public revenue from court imposed delays in the collection of taxes, leaving aggrieved taxpayers to sue for refunds of any amounts improperly collected. Thus, the section presupposes a bona fide attempt of the government to collect revenue. Therefore, if a levy on property is in formal guise an effort to collect taxes but in fact is only a device for harassing and punishing a wrongdoer without honest anticipation that the levy may yield money owed for taxes, it is arguable that a suit to restrain the tax collector's enterprise is not in reality a suit to restrain the collection of taxes. Accordingly, it is relevant to consider whether we have here a bona fide effort to collect revenue.

The taxpayers do not dispute that they may owe the government substantial sums of overdue taxes, though they dispute the claimed amount of their total indebtedness. Moreover, at the time of the jeopardy assessment and resultant levies the taxpayers, who had not filed a complete inventory of their possessions, appeared to be the owners of mortgaged income producing rental property, a fur-

nished home, a life insurance policy, bank accounts, automobiles and the contents of a safe deposit box. It is not disputed that in the aggregate the levies on their property were intended to and probably would yield substantial revenue, although in the district court counsel for the government conceded that at least some of the real property was so heavily mortgaged that a forced sale would not in likelihood benefit the government.

Though one of the government's objectives in this undertaking to seize all of the taxpayers' discoverable property may have been to put economic pressure upon persons believed to be engaged in large scale criminal activities, the jeopardy assessment and consequent levies also appear to have been bona fide and potentially productive attempts to collect revenue. And bona fide efforts to collect taxes through lawful procedure are the very undertakings that Congress has protected through the enactment of section 7421(a) against frustration or delay by litigation.

The district court was understandably and properly concerned that the taxpayers not be forced to choose between forfeiting their property without contesting the tax assessments on the one hand and, on the other, incriminating themselves by admitting in a tax refund suit that they had been engaged in an illicit enterprise for which they already had been indicted. But a tax refund claim and complaint adequate to toll the running of the statute of limitations could be drafted and filed without damaging admissions concerning the details or even the nature of taxpayers' business. And further proceedings in such a suit would properly be deferred on the plaintiffs' request until the conclusion of related criminal proceedings against them or until the running of all applicable periods of limitations on prosecutions. *Cf. United States* v. *Kordel,* 1970, 397 U.S. 1, 12 note 27; *De Vita* v. *Sills,* 3d Cir. 1970, 422 F.2d 1172, 1181. And in the unlikely case of an arbitrary

refusal of a district judge to grant such a stay, the abuse of discretion would be reviewable in this court.

For these reasons we have concluded that section 7421(a) of the Internal Revenue Code prohibits the relief granted to the taxpayers in this case.

The judgment will be reversed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1418

ROBERT E. IANNELLI AND DOLORES IANNELLI, HIS WIFE

v.

H. ALAN LONG, District Director, Pittsburgh, Pennsylvania and JOHNNIE M. WALTERS, Commissioner of Internal Revenue of the United States of America, successor to HAROLD T. SWARTZ, *Appellants*

Sur Petition for Rehearing

Present: SEITZ, *Chief Judge;* and HASTIE, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN and HUNTER, *Circuit Judges;*

The petition for rehearing filed by ROBERT E. IANNELLI and DOLORES IANNELLI, his wife, *Appellees,*

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ VAN DUSEN
Circuit Judge

Dated: July 26, 1973

APPENDIX D

Statutes Involved

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 4401. IMPOSITION OF TAX.

(a) *Wagers.*—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) *Amount of Wager.*—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, than an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) *Persons Liable for Tax.*—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) [as amended by Sec. 110(c), Federal Tax Lien Act of 1966, P. L. 89-719, 80 Stat. 1125] *Tax.*—Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against who such tax was assessed.

• • •

PART C—ILLEGAL GAMBLING BUSINESS

Sec. 803. (a) Chapter 95, title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 1955. *Prohibition of illegal gambling businesses*

"(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

"(b) As used in this section—

"(1) 'illegal gambling business' means a gambling business which—

"(i) is a violation of the law of a State or political subdivision in which it is conducted;

"(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

"(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

"(2) 'gambling' includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

"(3) 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

"(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive

days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

"(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

"(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity."

(b) The analysis of chapter 95, title 18, United States Code, is amended by adding at the end thereof the following new item:

"1955. *Prohibition of illegal gambling businesses.*"

• • •

§ 2516. *Authorization for interception of wire or oral communications*

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or wit-

ness generally), section 1510 (obstruction of criminal investigations), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the applica-

tion is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216.

LIBRARY
SUPREME COURT, U. S.
OCT 29 1973

No. 73-412

In the Supreme Court of the United States

OCTOBER TERM, 1973

ROBERT E. IANNELLI AND DOLORES IANNELLI, HIS WIFE, PETITIONERS

v.

H. ALAN LONG, DISTRICT DIRECTOR, PITTSBURGH, PENNSYLVANIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
SCOTT P. CRAMPTON,
Assistant Attorney General,
JOHN P. BURKE,
ROBERT E. LINDSAY,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-412

ROBERT E. IANNELLI AND DOLORES IANNELLI, HIS WIFE, PETITIONERS

v.

H. ALAN LONG, DISTRICT DIRECTOR, PITTSBURGH, PENNSYLVANIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B 12a-15a) is not yet officially reported. The opinion of the district court (Pet. App. A 1a-11a) is reported at 333 F. Supp. 407.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1973 (Pet. App. B 12a). A petition for rehearing was denied on July 26, 1973 (Pet. App. C 16a). The petition for a writ of certiorari was filed on September 4, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 7421(a) of the Internal Revenue Code prohibits an injunction restraining officials of the Internal Revenue Service from executing on certain liens or otherwise attempting to collect upon a jeopardy assessment issued for failure to pay federal wagering excise taxes allegedly due.

STATUTES INVOLVED

Sec. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) [as amended by Sec. 110(c), Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125] *Tax.*—* * * no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person * * *.

* * * * *

STATEMENT

On March 25, 1971, petitioners were indicted for conspiring to violate and violating various federal gambling statutes (App. 103; Supp. App. 32, 34).[1] After a previous abortive assessment and levies, the Internal Revenue Service issued on August 6, 1971, a jeopardy assessment against petitioners jointly of $722,205.18 for failure to pay federal wagering excise taxes alleged to be due under Section 4401 of the Internal Revenue Code of 1954 (App. 7, 20-21). Thereafter, the Internal Revenue Service filed a lien against petitioners and levied on their various properties (App. 18-25, 77-78).

---

[1] "App." and "Supp. App." refer to the appendices in the court of appeals.

The jeopardy assessment was based upon a projection of petitioners' wagers determined from records seized by the Pennsylvania State Police on September 20, 1969,[2] and from information obtained pursuant to a court-authorized electronic surveillance (in operation during the period October 21, 1970 through November 2, 1970), which revealed that petitioners were accepting wagers on numbers, football games and horse races[3] (App. 36-38, 41, 44-45,

---

[2]Following denial of his motion to suppress the seized records as evidence in state court proceedings, petitioner Robert Iannelli pleaded guilty in a Pennsylvania court to illegal gambling (App. 96, n. 1, 105, n. 4).

[3]Petitioners in the federal criminal proceeding moved to suppress this evidence obtained from the electronic surveillance. They alleged that the procedure followed by the Department of Justice in its application to a federal judge for an interception order did not comply with the requirements of Title III, Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510-2520) and that there had been an unauthorized disclosure of the material to the Internal Revenue Service. The district court denied the motion to suppress. *United States* v. *Iannelli,* 339 F. Supp. 171 (W.D. Pa.). Thereafter, petitioner Robert Iannelli was convicted, but the jury was unable to reach a verdict on Dolores Iannelli. On Robert Iannelli's appeal, the contentions raised in his motion to suppress were rejected and his conviction was affirmed. *United States* v. *Iannelli,* 477 F. 2d 999 (C.A. 3). Dolores Iannelli was retried and convicted. On appeal, her conviction was affirmed in an opinion, which is not yet officially reported.

Both petitioners have filed petitions for writs of certiorari in their criminal cases (Nos. 73-64 and 73-103, October Term, 1973), which raise the question whether the procedures for authorization followed by the Department of Justice complied with the statute. The question is presently before this Court in *United States* v. *Chavez,* No. 72-1319, certiorari granted, May 21, 1973, and *United States* v. *Giordano,* No. 72-1057, certiorari granted, March 26, 1973. As a result, the government has suggested that this Court may wish to defer disposition of those petitions until after the decisions in *Chavez* and *Giordano.*

96-99). The average amount wagered per day in each category was determined and this figure was then projected for the period of September 1969, through October 1970. The resulting figure was taken as the total gross wagers accepted and the federal wagering excise tax computed on this amount (App. 43, 97-99).

On September 27, 1971, petitioners commenced this action seeking a preliminary injunction against collection efforts by the Internal Revenue Service. They alleged that the actions of the Internal Revenue Service were part of an attempt to force petitioners to waive their Fifth Amendment rights or to forfeit their real property; that the assessment was based upon illegally obtained evidence; and that they faced immediate and irreparable injury without an adequate remedy at law (App. 8-9).

After a hearing, the district court issued a temporary injunction prohibiting the Internal Revenue Service from executing on the liens or attempting to collect the jeopardy assessment (App. 113; Pet. App. A 10a-11a).[4] The court, noting that petitioners were under indictment, concluded that collection activities should be enjoined "until such time as the criminal proceedings have terminated, the criminal statute of limitations shall have tolled, or such earlier event as may occur to protect the rights of the parties" (App. 112; Pet. App. A 10a). On appeal, the Third Circuit reversed because of the bar against such injunctions provided by Section 7421(a) of the Internal Revenue Code of 1954, which states that "* * * no

---

[4]The order also provided that all liens were to remain in full force and effect; that petitioners could not alter any property to which a lien was applicable; and that a Receiver was to be appointed to collect rents from petitioners' realty and apply the sums collected to outstanding mortgages and to deposit any remaining monies in interest-bearing accounts (App. 113; Pet. App. A 11a).

suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person * * *."

ARGUMENT

1. In holding that petitioners were not entitled to injunctive relief against the collection of the wagering taxes at issue, the court of appeals correctly applied Section 7421(a) of the Internal Revenue Code. That provision prohibits suits to restrain the assessment or collection of any tax. As this Court explained in *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 7:

> The manifest purpose of §7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner the United States is assured of prompt collection of its lawful revenue. [Footnote omitted].

In *Williams Packing* the Court unanimously held that the only situation in which the collection of taxes might be enjoined is where it is clear that under no circumstances could the government ultimately prevail.

Here, the district court made no finding that the asserted tax deficiencies could under no circumstances be upheld in a refund suit. Nevertheless, it enjoined collection efforts by the Internal Revenue Service as a result of its view that, without such relief, petitioners' asserted Fifth Amenment rights would not be protected. Specifically, the district court believed that petitioners would otherwise be forced to choose between forfeiting their property without contesting the tax assessments or possibly incriminating themselves by admitting in a tax refund suit that they had been engaged in illegal activities for which they had been indicted.

Contrary to the district court's assumption, petitioners are not subject to a choice between such alternatives. As the court of appeals pointed out, a refund claim and complaint adequate to toll the statute of limitations could be drafted and filed without damaging admissions, and further proceedings in such a suit would properly be deferred on petitioners' request until the conclusion of related criminal proceedings or until the expiration of all applicable periods of limitations on prosecutions (Pet. App. B 14a). Under these circumstances, no danger of self-incrimination would arise.

Moreover, the fact that the assessment appears to have been based in part upon evidence obtained by means of electronic surveillance does not, as petitioners urge (Pet. 8-11), remove the case from application of the *Williams Packing Co.* rule. Petitioners' claim that the validity of the surveillance is "in serious question" (Pet. 11) does not justify restraining the collection of the taxes until after the disposition of the criminal cases. The injunctive relief sought by petitioners may be granted "[o]nly if it is * * * apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim." *Enochs* v. *Williams Packing Co., supra,* p. 7. Since the questions raised in petitioners' criminal cases have been decided adversely to them at both the district court and court of appeals level and are presently pending before this Court in other cases to be decided this Term, "under the most liberal view of the law and the facts" the validity of the government's tax claim would be upheld. Finally, apart from the validity of the electronic surveillance, there was other evidence which might be sufficient to sustain the tax assessment.

2. Neither *Lucia* v. *United States,* 474 F. 2d 565 (C.A. 5), nor *Pizzarello* v. *United States,* 408 F. 2d 579 (C.A. 2),

certiorari denied, 396 U.S. 986, cited by petitioners (Pet. 6-7), are in conflict with the decision below. Both of those cases hold, in accordance with *Williams Packing Co.*, that even if the taxpayer faces irreparable financial injury, the courts are not free to enjoin the collection of taxes unless it can be shown that the assessment is arbitrary, capricious, and without foundation.[5] Here, petitioners have not made the requisite showing to support injunctive relief. As the court of appeals observed, the actions of the Internal Revenue Service "appear to have been bona fide and potentially productive attempts to collect revenue" (Pet. App. B 14a).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

JOHN P. BURKE,
ROBERT E. LINDSAY,
Attorneys.

OCTOBER 1973.

---

[5]Contrary to petitioners' suggestion, there is no relationship between this case and *Alexander* v. *"Americans United" Inc.*, No. 72-1371, certiorari granted, June 4, 1973, and *Bob Jones University* v. *Shultz*, certiorari granted, October 9, 1973. Both of those cases present the question whether Section 7421(a) and the Declaratory Judgment Act, 28 U.S.C. 2201-2202, bar an injunctive action either to compel the Commission to grant tax exempt organization status or to prevent him from revoking such status.